UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHANA HACKETT, Plaintiff, vs. THE PROCTOR & GAMBLE COMPANY, Defendant.	CASE NO. 06cv2272-MMA(WMc) **ORDER DENYING PLAINTIFF'S MOTION FOR ATTORNEYS FEES** [Doc. No. 42]

Before the Court in the above-captioned matter is Plaintiff Shana Hackett's Motion for Attorneys Fees Under the "Catalyst Theory" [Doc. No. 42] in which she argues that because the instant litigation resulted in Defendant Proctor & Gamble Company making marketing changes to its products sought by Plaintiff in her lawsuit, an award of attorneys fees and costs is warranted pursuant to California Code of Civil Procedure § 1021.5. Defendant Proctor & Gamble Company filed an opposition to the motion [Doc. No. 55] and Plaintiff filed a reply [Doc. No. 56]. On December 19, 2008, the Court held a hearing on the motion and counsel for the parties presented oral arguments. For the following reasons, and for reasons stated orally during the hearing, the Court **DENIES** Plaintiff's Motion for Attorneys Fees Under the "Catalyst Theory" [Doc. No. 42].

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BACKGROUND

On March 4, 2008, Plaintiff filed a Second Amended Complaint alleging the following claims: violations of California's Unfair Competition Law ("UCL"), section 17200 et seq. of California's Business and Professions Code; violations of California's False Advertising Law ("FAL"), section 17500 et seq. of California's Business and Professions Code; negligent misrepresentation; intentional misrepresentation; fraud by omission; breach of express warranty; breach of implied warranty of merchantability; breach of implied warranty of fitness for purpose; and

violations of California's Consumer Legal Remedies Act ("CLRA"), section 1750 et seq. of California's Civil Code. (*See Second Amended Complaint* ¶¶ 29-81.)

Plaintiff alleges that she purchased a product known as Pantene Pro-V Daily Moisture Renewal from the Defendant which is falsely promoted as able to strengthen and repair damaged hair. Plaintiff alleges that she purchased the product because she was exposed to representations by Defendant that the product would strengthen her hair; that she was seeking a safe method for strengthening her hair; that she relied upon these material representations as a basis for her choice; and that after using the product for some time she realized that it had no strengthening effect and that Defendant's claims were false. Specifically, Plaintiff alleges the packaging of the product makes a false and misleading claim regarding the effect of using the product on hair, stating '10X Stronger Hair.'

The essence of Plaintiff's current motion is that this case has resulted in Defendant making the exact marketing changes that she sought when filing suit, including removal of the numeric claims on its product labels and reformulation of its product descriptions to redefine the value and use of its products. Based on this result, Plaintiff argues that she is entitled to recover attorneys fees because her lawsuit acted as a catalyst prompting Defendant to re-market its product in a non-misleading manner.

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Discussion

California Code of Civil Procedure Section 1021.5 provides, in pertinent part, as follows:

> "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

California courts apply the "catalyst theory" to justify a Section 1021.5 fee award. Under the catalyst theory of recovery, a plaintiff may be entitled to recover attorneys fees even if the legal action does not result in a favorable final judgment. *Graham v. Daimler Chrysler Corp.*, 34 Cal. 4th 553, 565-66 (2004). However, under such circumstances, "a plaintiff must not only be a catalyst to defendant's changed behavior, but the lawsuit must have some merit, . . . and the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant prior to litigation." *Id.* at 560-61.

Plaintiff claims that she has met all of the required elements for an award of attorneys fees under California law. First, she argues that Defendant's changes to its marketing have provided the public with benefits affecting an important public interest. Second, Plaintiff argues that her claims have merit and thus Defendant's changes resulted from Plaintiff's "threat of victory" in this litigation, not out of nuisance. Third, Plaintiff argues that she reasonably attempted to settle her claims with Defendant prior to commencing this litigation. In support of this final factor, Plaintiff refers to a prior case filed in this Court by another individual against Defendant in which the allegations of misrepresentation were the same, *Gonzalez v. Proctor & Gamble, et al*, Civil Case No. 06cv869-WQH(WMc). Plaintiff asserts that the settlement conferences held by the Court in the *Gonzalez* case represent an attempt by her to settle her own claims, because although she was not a party to that suit, she was aware of the litigation and sought leave to substitute herself as the lead plaintiff in the case. The Court did not permit her to do so, and eventually the case was voluntarily dismissed - this case was filed thereafter.

Plaintiff originally sought $509,515.78 in fees and costs for the combined efforts of the firm which represented Plaintiff Gonzalez and her own attorney's efforts in this case. Plaintiff has provided billing records for both cases which confirm that Plaintiff's attorney in this case incurred $31,980 out of the total amount claimed. During the December 19, 2008 motion hearing, Plaintiff's counsel conceded on the record that if Plaintiff's motion is granted, she is only entitled to fees incurred by her attorney with respect to her representation in this case, and that she is not eligible to recover the remainder incurred by Gonzalez's attorneys in the prior case.

Defendant presents several arguments in opposition to Plaintiff's assertion of entitlement to attorneys fees under Section 1021.5. First, Defendant notes that Exhibit "B" attached to attorney Harold Hewell's declaration in support of Plaintiff's motion consists of an expert report that the Court deemed inadmissible on October 17, 2008, five days after Plaintiff filed the instant motion. (*See* Doc. No. 43.) The report was proffered by Plaintiff to support her assertion that the product at issue does not increase tensile strength by a factor of ten, rendering Defendant's marketing of the product misleading and fraudulent. As a result, Defendant argues that Plaintiff's substantive argument in support of the alleged changes in marketing relies on excluded evidence. Defendant asserts that because Plaintiff provides no additional evidence to support her theory that the litigation changed Defendant's marketing, her lawsuit is without merit, she cannot satisfy the second element of *Graham*, and her motion should be denied.

Defendant argues that in addition to her failure to demonstrate her case has merit, Plaintiff does not have standing to pursue her claims. Defendant asserts that Plaintiff lacks standing because the three bottles of the product she bought predated Defendant's allegedly misleading marketing of the product. As a result, Defendant states that Plaintiff could not have relied on the marketing when purchasing the product, an essential element of her remaining claims.

Third, Defendant asserts that Plaintiff cannot satisfy the third element of *Graham* because she failed to attempt settlement prior to filing suit. Defendant argues that Plaintiff cannot rely on attempts made by others to settle the *Gonzalez* case to support her contention that she tried to settle her claims prior to filing this lawsuit. Defendant further points out that even if she could rely on settlement negotiations which occurred in a different case, to which she was not a party, those negotiations occurred during the course of the *Gonzalez* litigation and therefore do not meet the requirement of *Graham* that settlement attempts take place prior to filing suit.

Plaintiff's claim for attorneys fees under the "catalyst theory" fails for several reasons. First, the Court agrees that Plaintiff offers no evidence to support her claim that she attempted to settle her claims prior to filing this lawsuit. Her assertion that post-filing settlement negotiations in the *Gonzalez* case are sufficient to satisfy the third element of *Graham* is unfounded. The Court notes that it could deny Plaintiff's motion on this basis alone.

Second, she relies on inadmissible evidence to support the threshold element of her claim for attorneys fees - that her lawsuit was the catalyst that changed Defendant's marketing. Even if the Court had not previously excluded Plaintiff's expert report, the report would not be sufficient to demonstrate a causal connection between this litigation and changes in Defendant's marketing. The report offers an expert opinion concluding that Defendant's product does not "strengthen" hair and therefore it's product labeling and marketing is misleading. (*See Hewell Decl'n. in Support of Motion*, Ex. "B," Expert Report of Mort Westman.) Plaintiff's counsel then uses the conclusions reached in the excluded expert report to compare Defendant's prior product marketing with the marketing that Plaintiff's counsel noticed on Plaintiff's website on August 6, 2008. (*Hewell Decl'n.* ¶ 2.) Plaintiff's contention that her lawsuit is the catalyst of alleged changes in Defendant's marketing and product labeling rests solely on Plaintiff's counsel's viewing of Defendant's website on a discrete date. This offer of evidence does not support the "chronology of facts" that Plaintiff claims as the basis for her contention that a causal connection can be inferred, and is simply insufficient to show that this lawsuit resulted in changes in Defendant's behavior. (*Plaintiff's Memorandum*, 13.)

Finally, Plaintiff offers no evidence to substantiate her claim that this lawsuit is meritorious - because she is not a "prevailing party" in the litigation, this is a requirement in order to be awarded attorneys fees under Section 1012.5 and she has failed to meet it. Once again Plaintiff relies on the previously excluded expert report and her attorney's own comparison of the report and Defendant's website to support the merit of her claims. Under *Graham*, Plaintiff has the burden of proving she satisfies all three elements in order to be entitled to an award of attorneys fees. She offers no other admissible evidence and her own allegations do not suffice, therefore the second *Graham* factor is not met. Furthermore, the Court finds that Plaintiff does not seek relief that offers a substantial public benefit; the product labeling and marketing at issue in this litigation does not rise to the level of importance necessary for Plaintiff to be eligible for an award of attorneys fees in this case.

Because Plaintiff fails to satisfy the essential elements as set forth by the California Supreme Court in *Graham v. Daimler Chrysler Corp*., 34 Cal. 4th 553, 565-66 (2004), she is not entitled to an award of attorneys fees under the catalyst theory of recovery.

CONCLUSION

Based on the foregoing, the Court **DENIES** Plaintiff's Motion for Attorneys Fees Under the "Catalyst Theory" [Doc. No. 42].

IT IS SO ORDERED.

DATED: January 5, 2009

Hon. Michael M. Anello
United States District Judge